

1 Oliver H. Goe
2 Browning, Kaleczyc, Berry & Hoven, P.C
3 800 N. Last Chance Gulch, Suite 101
4 P.O. Box 1697
5 Helena, MT 59624-1697
6 Telephone: (406) 443-6820
7 Facsimile: (406) 443-6883

8 Attorneys for Intervenors

9 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

10 FT. HARRISON VETERANS RESIDENCE,
11 Limited Partnership,,
12

13 Petitioner,

14 v.

15 MONTANA BOARD OF HOUSING

16 Respondent.

17 CENTER STREET LP, SWEET GRASS
18 APARTMENTS LP, SOROPTIMIST
19 VILLAGE LP, FARMHOUSE PARTNERS-
20 HAGGERTY LP and PARKVIEW VILLAGE
21 LLP,
22

23 Intervenors.

Case No. DDV 2012-356

**INTERVENORS' RESPONSE IN
OPPOSITION TO FHVR'S MOTION FOR
PRELIMINARY INJUNCTION**

24 Intervenors Center Street, LP, Sweet Grass Apartments, LP, Soroptimist Village, LP,
25 Farmhouse Partners-Haggerty, LP, and Parkview Village, LLP (collectively and hereinafter
26 referred to as "Intervenors") reply through their counsel of record to FHVR's motion for
27 preliminary injunction. Intervenors join and adopt the arguments in Respondent's Response in
28 Opposition to FHVR's Motion For Preliminary Injunction filed by the Montana Board of Housing
29 (hereinafter "MBOH").

30 FHVR's request for a preliminary injunction and challenge to the 2013 QAP in its entirety
31 requires Intervenors to highlight for this Court why FHVR's underlying challenge to the awards

1 made pursuant to the 2012 QAP does not present a “justiciable controversy” on the grounds of
2 “mootness.” Simply put, the 2013 QAP allows for a “Corrective Award” which would allow
3 FHVR, should it prevail, to obtain tax credits allocated in 2013, without impacting the awards
4 made in 2012 and upon which the Intervenors have relied in carrying their respective projects
5 through to completion. If the Corrective Award is no longer available, for the reasons previously
6 argued to this Court, it would be impossible for this Court to grant effective relief. There is no
7 way to restore the parties to their original positions and FHVR’s challenge to the 2012 awards is
8 moot.

9 **FHVR’S ATTACK ON THE 2013 QAP INCLUDING THE CORRECTIVE**
10 **AWARD RENDERS THE 2012 CHALLENGE MOOT**

11 The 2013 QAP provides in relevant part:

12 **Corrective Award:**

13 Such portion of the state’s available annual credit allocation is reserved and
14 set-aside as is necessary for award of credits to:

- 15 • Any project for which an application was submitted in a prior
16 round or year, if:
 - 17 ◦ a final order of a court of competent jurisdiction
18 determines or declares that such applicant was entitled to an
19 award in such prior round or year or requires the Board to make
20 an award or allocation of tax credits to such project;
 - 21 ◦ a final order of a court of competent jurisdiction invalidates
22 or sets aside an award of credits to an approved project from such
23 prior round or year and a reservation agreement was executed by
24 the Board and such applicant prior to issuance of such court order,
25 unless such court order determines that such project was not
26 eligible or qualified under the applicable QAP to receive an award
27 of tax credits; or
 - the Board, upon further consideration of any award
determination as required by and in accordance with the order of a
court of competent jurisdiction, determines that such project was
entitled to an award in such prior round or year.

All requirements and conditions of this Corrective Award set aside
provision must be met to receive an award under this set aside provision.
The amount of any award under the Corrective Award set aside shall be the

1 amount specified by the court, or if no award amount is specified by the
2 court, an amount determined by the Board in accordance with this QAP.
3 The Corrective Award set aside shall be funded first from returned or
4 unreserved tax credits from a prior year. Awards may be "future allocated"
5 under this Corrective Action set aside, i.e., such awards may be made from
6 returned or unreserved tax credits from a prior year and/or the current year's
7 credits at any Board meeting after the final court order has been issued and
8 presented to the Board. Such award need not await the annual application
9 and award cycle.

10 2013 Qualified Allocation Plan, p. 17.

11 In adopting the Corrective Award, the MBOH set forth in detail the reasons why
12 such a Corrective Award is necessary, stating:

13 In addition to considering comment and approving revisions in other
14 areas, at its October 15, 2012 meeting, the Board addressed one
15 particularly urgent issue. The Board received comment regarding the
16 proposed 2013 QAP from applicants that were awarded tax credits in
17 2012. **The viability of projects that received awards of 2012 tax**
18 **credits has been seriously threatened as a result of the filing of a**
19 **lawsuit by an unsuccessful 2012 applicant. Because of uncertainty**
20 **resulting from the pending lawsuit, potential investors have declined**
21 **to commit to or advance funds for the projects. If these projects are**
22 **not able to move forward very soon, in some cases within the next 30**
23 **days, they may lose their window of opportunity to proceed. As a**
24 **result, the corresponding 2012 tax credits could revert to the federal**
25 **government and become unavailable for allocation in the State of**
26 **Montana. It is unknown when the litigation will be resolved.**

27 The commenters requested that language be added to the 2013 QAP to
allow allocation of tax credits from a future year in the event that a court
were to invalidate prior tax credit awards or order an award of tax credits
to an unsuccessful applicant. One commenter provided an example of
such a forward allocation provision from another state.

At its October 15, 2012 meeting, the Board considered and approved
2013 QAP language providing a Corrective Award set aside
provision to make available sufficient additional credits for any
award required by a court based upon a legal challenge to a prior
award determination. This language creates a priority set aside of
credits to fund such awards, first using returned or unreserved
credits from a prior year and then current year credits.

1 **This set aside language provides for an award of tax credits to a**
2 **prior unsuccessful applicant that has obtained a court order**
3 **requiring an award.** The language also provides for an award from this
4 set aside to an applicant who previously received an award and entered
5 into a reservation agreement with the Board prior to the Court order,
6 where the prior award has been invalidated by a court. An award could
7 be made to such applicant from the set aside unless a court has
8 determined that such applicant was not eligible or qualified to receive an
9 award under the applicable QAP.

10 The language allows such awards to be made at any time during the year
11 at a meeting of the Board upon consideration of a final court order
12 satisfying the criteria of the QAP set aside language. Such an award is,
13 of course, conditioned upon IRS authorization and allocation of tax
14 credits for the State of Montana for the applicable year. The language
15 also provides that the Board will allocate credits in accordance with
16 reservation agreements entered into by the Board based upon prior
17 awards, unless the Board determines that it is precluded by court order
18 from doing so.

19 **This Corrective Award language is necessary to provide a**
20 **mechanism and source of credits to address court challenges to tax**
21 **credit awards. To meet the strict timelines for tax credit carryover**
22 **and placement of projects in service, projects must move forward**
23 **with development and construction quickly and diligently following**
24 **an award of tax credits. These timelines cannot accommodate delay**
25 **until litigation is resolved, which may take many months or even**
26 **years. It is impractical at best to delay development and**
27 **construction of projects receiving current awards until litigation is**
 resolved. The Corrective award addresses this problem by
 providing for an award from a future period to address the results
 of any legal challenge.

 The Corrective Award language is also necessary to assure awardees and
 their investors to the greatest extent possible that successful awardees
 will receive tax credit allocations despite legal challenges brought by
 unsuccessful applicants. **Although the Board believes that the**
 currently pending litigation lacks merit, the mere existence of such
 litigation and its attendant uncertainties has prevented projects
 from closing their investment transactions or receiving investor
 advances, effectively halting development and construction.

 The approved language provides such assurance, first by making
 un-awarded future credits available, so that there is no need to take
 previously-awarded credits from a successful applicant so that the
 credits can be awarded to a challenger. The language provides further

1 assurance by allowing the Board to make a new allocation to previous
2 successful awardees where the prior award has been invalidated by a
3 court, unless the court has determined that such awardee did not meet
4 the minimum threshold requirements for an award. The language also
assures that the Board will allocate credits in accordance with prior
reservation agreements, unless precluded by court order from doing so.

5 **This Corrective Award language is necessary to provide a**
6 **mechanism and source of credits to address court challenges to tax**
7 **credit awards, and to provide the assurances necessary for**
8 **applicants awarded tax credits in 2012 to obtain the necessary**
9 **investment and complete their projects in time to receive the tax**
10 **credit allocations.** Without such provisions, some or all of the projects
awarded credits are unlikely to be built, resulting in loss of the additional
housing units expected to be made available to low income Montanans
through the awarded credits.

11 Notice of Public Hearing on Proposed Amendment, Oct. 30, 2012 (emphasis added).

12 Intervenor previously briefed to this Court why the challenge to the 2012 allocation is not
13 justiciable because of mootness. *See* Intervenor's Reply Brief to Respondent's Motion to Dismiss
14 8-11 and Intervenor's Combined Reply Brief to Fort Harrison's Response to Materials Submitted
15 by Montana Board of Housing and Intervenor and Brief in Response to Fort Harrison's Motion
16 For Summary Judgment 2-6. At the previous hearing in this matter, Intervenor advised the Court
17 that should the 2013 QAP be adopted by the MBOH and approved by the Governor, that the
18 mootness arguments would no longer apply in that the Court could grant effective relief to FHVR
19 without impacting the 2012 awards to the Intervenor. Assuming the 2013 QAP is not in effect,
20 the mootness arguments previously raised by the Intervenor jump, once again, to the forefront.
21 Additionally, these arguments are much more compelling in that each of the Intervenor has
22 continued with their respective projects based on the tax credits and binding contracts entered into
23 with the MBOH. It is impossible at this juncture for the Court to put the toothpaste back in the
24 tube. The tax credits have been utilized by all of the Intervenor in financing their respective
25 projects and hundreds of thousands of dollars have been spent in development and construction.

1 **CONCLUSION**

2 Intervenor respectfully request that the preliminary injunction be denied for the reasons set
3 forth in the brief filed by the Montana Board of Housing and as set forth herein.

4 DATED this 24th day of January, 2013.

5 BROWNING, KALECZYC, BERRY & HOVEN, P.C.

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7
8 By  _____
9 Oliver H. Goe

10 Attorneys for Intervenor

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14 **CERTIFICATE OF SERVICE**

15 I hereby certify that on the 24th day of January, 2013, a true copy of the foregoing was
16 mailed by first-class mail, postage prepaid, addressed as follows:

17 Michael Green
18 Crowley Fleck, PLLP
19 100 N. Park Ave., Ste. 300
P.O. Box 797
Helena, MT 59624-0797

20 Gregory Gould
21 Luxan & Murfitt, PLLP
22 P.O. Box 1144
Helena, MT 59604

23
24  _____
25 BROWNING, KALECZYC, BERRY & HOVEN, P.C.